No. 91-168

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

JOHN W. RUTANA,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where 18 U.S.C. 3742 states that the United States must obtain the personal approval of the Solicitor General before appealing a sentence imposed upon a Defendant, and the United States fails to obtain such approval, can the Court of Appeals choose to ignore the statute when such failure is challenged by an Appellee and apply the rule prospectively and not to the case before the Court?

2. Where the Federal Sentencing Guidelines are void of any reference to how an Employer-Defendant's sentence will impact the socio-economic status of his/her employees, can the District Court deviate from the Guidelines when it finds that such sentence will adversely affect those employees livelihood?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are those contained in the caption of the case, to wit: John W. Rutana, President of Finishing Corporation of America, and the United States Government.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John W. Rutana, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on May 8, 1991.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals is reported at _____ F.2d _____, and is printed in Appendix A hereto, *infra*, page A3. The Journal Entry of the Judgment of the United States District Court for the Northern District of Ohio is printed in Appendix B hereto, *infra*, page A12. The Opinion of the Sixth Circuit Court of Appeals rendered on August 23, 1990, Appendix C, *infra*, page A20.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 8, 1991. The Jurisdiction of the Supreme Court is invoked under 28 United States Code Section 1254 (1). The United States District Court had jurisdiction over this case under 18 U.S.C. Section 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the United States Constitution; Title 18 United States Code Sections 3553 (b) and 3742 (b); and Section 5H1.10 of the Federal Sentencing Guidelines.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. §3553 (b):

> **(b) Application of guidelines in imposing a sentence.** The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an

aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. §3742 (b):

(b) **Appeal by the Government.** The Government with the personal approval of the Attorney General or the Solicitor General, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of

probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

United States Sentencing Guidelines:

SENTENCING COMMENTARIES

PART H—SPECIFIC OFFENDER CHARACTERISTICS

Introductory Commentary

Congress has directed the Commission to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined relevant by the Commission. 28 U.S.C. §994(d).

§5H1.10 Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)

These factors are not relevant in the determination of a sentence.

STATEMENT OF THE CASE

Petitioner, John W. Rutana, is the majority shareholder of Finishing Corporation of America (hereinafter FCA) and operating officer and sole owner of Viking Manufacturing Company.

FCA had been in operation since 1981. This operation was a chemical anodizing plant. In 1988 the EPA and FBI began investigating FCA. This investigation surrounded the discovery of certain pollutants in the City of Campbell's waste water treatment facility. The investigation led to the discovery that these pollutants were being drained into pipes leading to the Campbell Waste Water Treatment Facility by FCA.

Rutana was charged in twenty-two counts of a Forty Count Federal Indictment, filed on May 31, 1989. He was charged in Counts 1 through 18 with violations of 33 U.S.C. Sections 1317 (d) and 1319 (c)(2)(a) (knowingly discharging pollutants), Counts 19 and 20 with violations of 33 U.S.C. Sections 1317 (d) and 1319 (c)(3) (knowingly discharging pollutants with knowledge that said discharging would place persons in imminent danger of injury) and Counts 39 and 40 of making false statements in a matter within the jurisdiction of the United States Environmental Protection Agency.

On October 2, 1989 Rutana pled guilty to the 18 Clean Water Act violations (Counts 1 to 18). Counts 19, 20, 39 and 40 were dismissed by agreement with the Government. In addition, the Government agreed to recommend that any terms of incarceration imposed upon the Petitioner run concurrently with each other.

The matter came before the Trial Court for sentencing on March 2, 1990. A Presentence Report had previously been filed. The Court accepted Presentence Report's Facts and Findings at the hearing. The Court imposed a fine on Mr. Rutana of Ninety Thousand Dollars ($90,000.00), placed him on five (5) years probation and sentenced him to One Thousand (1000) hours of community service in the area of studying pollution problems and working out solutions to the same.

The Presentence Report calculated Mr. Rutana's offense level at eighteen (18). Applying Section 2Q1.2 of the sentencing guidelines, mishandling of hazardous or toxic substances for a base level of eight (8). Six (6) additional points were then added pursuant to Section 2Q1.2 (b)(1)(A) for repetitive discharge. Four (4) additional points were then added for disruption of a public utility pursuant to Section 2Q1.2 (b)(3). Two points were then added for a leadership role. Finally, two points were subtracted for the acceptance of responsibility.

Under a sentence level of eighteen (18) Mr. Rutana was to be imprisoned for a period of 27 to 33 months. However, the Trial Court departed from the Guidelines down to a level of six (6). The District Court departed from the Guidelines on the basis that if Mr. Rutana were imprisoned as the Guidelines called for, then Viking Manufacturing which employed approximately thirty (30) persons would be closed. The Court felt that any imprisonment of Rutana would force his employees out of work. Thus the Court's departure was not based on Rutana's social or economic status, but was based on the economic and social impact it would have on those

persons who relied on Rutana for their employment. Fiorini and Barnes, who were also indicted, received probation.

The Government then filed its Notice of Appeal to the Sixth Circuit on April 13, 1990. However, the Government failed to get the necessary authorization of the Solicitor General to file its Appeal. This authorization is made mandatory by 18 U.S.C. 3742 (b). On April 17, 1990 the Solicitor General stated in a written Memorandum that he had orally given the Government the consent to appeal. On April 19, 1990 the Government filed such authorization.

On July 12, 1990 Rutana filed a Motion to Dismiss this Appeal based upon the failure of the United States to include a written authorization of the Solicitor General simultaneous with the filing of the Notice of Appeal.

On August 23, 1990 the Sixth Circuit denied Rutana's Motion to Dismiss. The Court stated that the Solicitor General's belated certification of written approval was sufficient. The Court then directed the Government to the Court's Opinion in *United States v. Smith*, 910 F.2d 326 (6th Cir. 1990) which prospectively imposed a rule to be followed in these types of Appeals.

On Appeal the Sixth Circuit reversed and remanded the case for resentencing. The Court stated that economic hardships were not factors for deviation and did not warrant a downward departure from the Guidelines. The Court stated that economic factors were addressed in the guidelines.

REASONS FOR GRANTING THE WRIT

Question No. 1:

In overruling the Defendant's Motion to Dismiss the Government's Appeal for failure to follow the mandates of 18 U.S.C. 3742 (b), the Court of Appeals stated that certification of the Solicitor General's written approval was sufficient in the Defendant's case. The Court then referred the Government to its recent opinion in *United States v. Smith,* 910 F.2d 326 (6th Cir. August 6, 1990).

In *Smith* the Court enunciated a rule to be followed prospectively in cases concerning the interpretation of 18 U.S.C. Section 3742 (b). In *Smith,* the Court stated:

> "... This court will impose by the exercise of its supervisory authority, prospectively, the requirement that written proof of the personal approval of either the Attorney General or Solicitor General be provided no later than the filing of the Government's Appellate Brief and that the personal approval be dated no later than the day on which the Notice of Appeal was filed by the Government. *Id.* at 328.

Three previous rulings by the Sixth Circuit, including one published decision, *United States v. Hayes,* 899 F.2d 515, 517 n.1 (1990), stated that the Court lacked jurisdiction to hear an Appeal when the Government failed to obtain the personal approval of the Solicitor General prior to filing its Appeal.

In support of the *Smith* decision, the Sixth Circuit cited to the Third Circuit decision of *United States v. Gurgiolo,* 894 F.2d 56 (1990). In *Gurgiolo,* the Defendant moved to dismiss the Government's Appeal on the grounds that the Government did not get the "personal approval of the Attorney General or Solicitor General".

However, in *Gurgiolo,* the Government had obtained *prior* approval from the Deputy Solicitor General acting in the Solicitor General's place. The Third Circuit likened the Government's failure to indicate approval "to an error in the caption of the pleadings . . ." which could not invalidate the Appeal under Fed. R. App. P. 3 (c).

The Court based this decision on the policy of liberal construction of Notices of Appeal. *See Simpson v. Norwesco, Inc.,* 583 F.2d 1007 (1978); *McAninch v. Traders Nat'l Bank,* 779 F.2d 466 (1985). Under such policy a Court will disregard any slight error in a Notice of Appeal "in situations where intent is apparent and there is no prejudice to the adverse party". *Id.* at 467 n.2. However, the policy of liberal construction does not meet the needed criteria in the present case.

Petitioner Rutana was sentenced on March 14, 1990. The Government did not appeal until April 13, 1990. By this time the Petitioner had begun serving his sentence and had no reason to believe the Government would appeal. Thus, the Government's intent to appeal the case was not apparent. Further, such Appeal would adversely impact the Petitioner as he had already begun serving the sentence imposed upon him. Additionally, the Petitioner contends that the Court's ruling is double-edged. That is to say that if the Petitioner had missed a deadline for filing in the Court or had not properly followed an appellate procedure, he most likely would have been penalized by the Court, not rewarded as the Government was.

Finally, the Sixth Circuit's ruling against Petitioner flies directly in the face of the legislative intent of 18 U.S.C. 3742 (b). In the Committee notes to Public Law 98-473 which authorized 18 U.S.C. Section 3742 (b)

Congress explicitly stated "the Government may petition for review of a sentence only with the personal approval of the Attorney General or the Solicitor General in order to assume that such appeals are not routinely filed for every sentence below the guidelines." 1984 U.S. Code Congressional and Administrative News 3337. It is apparent that the Congress intended for this approval to be had prior to the Appeal being filed, and such proof of approval to accompany the filing of the Notice of Appeal. Congress intended to prohibit a retroactive approval such as was present in this case.

By allowing the Government to obtain the approval of the Solicitor General as it did, the Sixth Circuit basically denied Mr. Rutana's procedural due process rights.

Question No. 2:

The Government's basis for its Appeal was the fact that the sentence which the District Court imposed upon the Petitioner was below and outside of the Federal Sentencing Guidelines. The Sixth Circuit stated at page six (6) of its Opinion:

> Thus, the District Judge clearly relied upon Rutana's ownership of another business which, he concluded, might fail if Rutana were to be incarcerated.
>
> Our de novo review leads us to a conclude (sic) that the circumstance expressly relied upon by the District Court does not make this case sufficiently unusual to warrant a downward departure from the Guidelines. The Guidelines specifically state that the Defendant's socio-economic status is not relevant in the determination of a sentence. U.S.S.G. Section 5H1.10; Brewer, 899 F. 2d at 508.

This is where the Appeals Court made its crucial mistake. The Petitioner has contended throughout this lengthy process that it was not his socio-economic status which the Trial Court considered, but it was the impact that sending the Petitioner to jail would have on others which the Court considered.

The Sentencing Guidelines do not take into consideration what impact the incarceration of a Defendant would have on the economic well-being of persons who depend on the Defendant for their livelihood. Section 1B1.4 of the Guidelines states:

> In determining . . . whether a departure from the Guidelines is warranted, the Court may consider, *without limitation*, any information concerning the background, character and conduct of the Defendant, unless otherwise prohibited by law.

The Federal Courts of Appeals have stated that the District Courts have very great discretion in deciding whether to depart from the guidelines. This discretion is mandated in part because the Sentencing Commission seeks to monitor such departures and, over time, create more accurate guidelines. *United States v. Rodriguez* (6th Cir. 1989), 882 F.2d 1059; *United States v. Ryan* (3rd Cir. 1989), 866 F.2d 604.

Further support of the discretion of the Trial Court can be found in the Senate Report which introduced the Comprehensive Crime Control Act. This report is included in the joint resolution of Congress which set out the details of the Comprehensive Crime Control Act of 1984.

Pertinent parts of the Senate Report contained in the joint resolution state as follows:

> The sentencing guidelines system will not remove all of the Judge's sentencing discretion. Instead, it will guide the Judge in making his decision on the appropriate sentence. If the Judge finds an aggravating or mitigating circumstance present in the case that was not adequately considered in the formulation of the guidelines and that should result in a sentence different from that recommended in the guidelines, the Judge may sentence the Defendant outside the guidelines ... The bill requires the Judge, before imposing sentence, to consider the history and characteristics of the offender, the nature and circumstances of the offense, and the purposes of sentencing. He is then to determine which sentencing guidelines and policy statements apply to the case. Either he may decide that the guideline recommendation appropriately reflects the offense and offender characteristics and impose sentence according to the guideline recommendation or he may conclude that the guidelines fail to reflect

> adequately a pertinent aggravating or mitigating circumstance and impose sentence outside the guidelines .... The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing Judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.

S. Rep. No. 98-225, 98th Congress, 1st Sess. (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3234-3235.

As can be seen from the above quoted language, the congressional intent of Congress was to allow a sentencing Judge to deviate from the guidelines when he finds a mitigating circumstance not taken into consideration by the guidelines. In the instant case, the Trial Court was, and is, all too aware of the economic straits which the people in the Northeastern Ohio region face. The Trial Court also properly considered the fact that sending Mr. Rutana to jail would almost certainly have an adverse affect on the lives of 30 other innocent families. The Judge, in his wise discretion, determined that keeping Mr. Rutana out of jail and running Viking Manufacturing was a far greater need than sentencing Mr. Rutana to prison. The basis for the Trial Court's decision had nothing to do with Mr. Rutana's socio-economic status. It was the result of the Trial Court's determination of the adverse impact on the socio-economic status of 30 innocent families who rely on Mr. Rutana for employment. This factor was clearly not included within the Guidelines. The Trial Court's decision also falls in line with the various Courts of Appeals' rulings that such departures will be monitored by the Sentencing Commission in order that more accurate guidelines be established. *Rodriguez, supra; Ryan, supra.*

CONCLUSION

The United States Government failed in its attempt to comply with 18 U.S.C. 3742 (b) when it decided to appeal the Trial Court's decision. Such failure resulted in the Court of Appeals having no jurisdiction to hear the present case. The Sixth Circuit, however, decided to ignore the statutory language and allow the Government to file the Solicitor General's approval after the appeal had been filed. Such decision constitutes a denial of the Defendant's procedural rights to due process.

The Sentencing Guidelines allow for deviation when a sentencing Judge deems it proper. This case contained certain elements which the Sentencing Guidelines did not take into consideration. The Trial Court properly deviated from the guidelines. The Sixth Circuit erred by reversing and remanding the District Court's Decision. The Appellate Courts have been remanding too many cases for resentencing within the guidelines. The congressional comments behind the guidelines show that the intended procedure is to allow the District Court Judge to deviate from the guidelines if his discretion deems it wise. The Commission would then look at such deviations and revise the guidelines accordingly.

Wherefore for the foregoing reasons, and because of the societal interest involved in this Petition, the Defendant respectfully requests this Court to grant his Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Judgment of the United States Court of Appeals for the Sixth Circuit

(Filed May 8, 1991)

No: 90-3343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN W. RUTANA,
Defendant-Appellee.

Before: KENNEDY, and NORRIS, *Circuit Judges;* MILES, *Senior District Judge*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed and remanded for resentencing.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

Issued as Mandate: May 31, 1991

COSTS: None

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Opinion of the United States Court of Appeals For the Sixth Circuit

(Filed May 8, 1991)

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-3343

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN W. RUTANA,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio

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Decided and Filed May 8, 1991

Before: KENNEDY and NORRIS, Circuit Judges; and MILES, Senior District Judge*

MILES, Senior District Judge. The United States appeals the district court's downward departure from the guidelines in sentencing John W. Rutana on 18 counts of knowing discharge of pollutants into a public sewer system in violation of the Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §1251 *et seq.* For the following reasons, we reverse and remand the case to the district court for resentencing.

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*The Honorable Wendell A. Miles, Senior United States District Judge for the Western District of Michigan, sitting by designation.

I

John Rutana was a part-owner and chief executive officer of a now-bankrupt corporation known as Finishing Corporation of America ("FCA"). In late 1985, FCA began operating a metal finishing plant in Campbell, Ohio. The plant was located directly across the street from the city of Campbell's Waste Water Treatment Plant ("CWWTP").

FCA's plant was constructed with a plastic discharge pipe, which was intended to transport sulfuric and nitric acids. This pipe led into a city sewer line, which in turn led directly into CWWTP.[1] During late 1986 and early 1987, CWWTP, which had recently been renovated, began experiencing problems associated with chemical waste water discharges coming from the FCA plant. CWWTP's manager notified Rutana of these problems, which included two massive "bacteria kills" at CWWTP. In addition,the Ohio Environmental Protection Agency sent a letter to FCA, which, among other things, contained a copy of the federal regulations pertaining to chemical waste water discharges. No additional problems associated with FCA's activities were documented for approximately one year thereafter.

Although Rutana and John C. Barnes, FCA's plant manager, claimed to have met in February, 1987 to devise a "mixing plan" to neutralize the acid and alkaline discharges, the ineffectiveness of this alleged plan became apparent in March, 1988, when CWWTP's problems associated with the FCA discharges resumed. A federal investigation ensued. Despite repeated attempts by the City of Campbell and the Ohio EPA to get FCA to take action to stop the discharges, and despite Rutana's obvious awareness of the problem, at least 18 separate instances of illegal discharges were documented during 1988. Two of these discharges resulted in injury to a

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[1]The CWWTP discharges into the Mahoning River, a source of drinking water for a number of communities.

CWWTP employee, who was burned while trying to sample the substances coming into the treatment plant from FCA. After federal agents threatened to obtain an injunction to prevent further discharges, Rutana voluntarily agreed to close the FCA plant, although at least one illegal discharge occurred in December, 1988 after the plant was supposedly closed.

On May 31, 1989, Rutana was indicted by a grand jury on 18 counts of "knowingly discharging and causing to be discharged pollutants which caused corrosive structural damage and which had a pH of less than 5.0 into a public sewer system and, thereby, into the Campbell, Ohio Waste Water Treatment Plant . . . in violation of national pretreatment standards," all in violation of 33 U.S.C. §1317(d) and §1319(c)(2)(A); on two counts of knowing endangerment of CWWTP employees, in violation of 33 U.S.C. §1319(c)(3); and on two counts of making false statements in a matter within the jurisdiction of the United States Environmental Protection Agency in violation of 18 U.S.C. §1001.[2] Also indicted were FCA itself and Barnes, both on 18 counts of knowing violation of pretreatment standards and on two counts of knowing endangerment.[3] Dr. Richard Fiorini, a minority shareholder of FCA, was indicted on 18 counts of negligent violation of pretreatment standards, under 33 U.S.C. §1319(c)(1).

On October 2, 1989, pursuant to a plea agreement, Rutana pled guilty to the 18 Clean Water Act violations, and the remaining charges were dismissed. Rutana's co-defendants also pled guilty pursuant to plea agreements with the government.

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[2]These latter two counts were based upon two instances in which Rutana allegedly lied to authorities about having contracted to clean up the discharges.

[3]Pursuant to a superseding information, Barnes was later charged with 17 counts of negligent, rather than knowing violation of the Clean Water Act.

A presentence report was prepared by the probation officer. Under 33 U.S.C. §1319(c)(2), the maximum penalty which could have been imposed upon Rutana for each violation was three years imprisonment and a $50,000 per day fine. The presentence report calculated that the guidelines indicated a term of imprisonment of 27 to 33 months, based upon an offense level of 18 and a criminal history category I (Rutana had no prior offenses). United States Sentencing Commission, *Guidelines Manual* (hereinafter "U.S.S.G."), Ch. 5, Part A (Nov. 1989)(Sentencing Table).[4] The report's calculation of the offense level, which is not disputed on appeal, is as follows:

> (1) Base offense level of eight (8) for mishandling of hazardous or toxic substances, under U.S.S.G. §2Q1.2(a).
>
> (2) Increase by six (6) levels, for repetitive discharge, under U.S.S.G. §2Q1.2(b)(1)(A).
>
> (3) Increase by four (4) levels, for disruption of a public utility, under U.S.S.G. §2Q1.2(b)(3).
>
> (4) Increase by two (2) levels, for playing a leadership role in the activity, under U.S.S.G. §3B1.1(c).
>
> (5) Decrease by two (2) levels, for acceptance of responsibility, under U.S.S.G. §3E1.1(a).

In detailing Rutana's employment record, the report noted that Rutana was also the owner and chief operating officer of another business, Viking Manufacturing Company, which employed 26 people. The probation officer also noted that neither the government nor defense counsel had

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[4]The events giving rise to counts one through eighteen of the indictment occurred between May 26, 1988 and December 9, 1988. The sentencing guidelines were therefore applicable.

presented him with factors to warrant a departure from the guidelines.

A sentencing hearing was held on March 2, 1990, at which all four defendants were sentenced. The district judge indicated that he accepted the facts and findings contained in the presentence report on Rutana. Nevertheless, the district court departed downward from level 18 to level 6, sentencing Rutana to five years probation, combined with 1,000 hours of community service. In addition, the court imposed a fine on Rutana in the amount of $90,000 (or, $5,000 per violation), and a special assessment in the amount of $950. The government's appeal followed.[5]

II

This circuit has established a three-step procedure to be used in reviewing downward departures from the guidelines. First, we determine whether the case is sufficiently "unusual" to warrant departure. *United States v. Brewer*, 899 F.2d 503, 506 (6th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 127 (1990).

> Second, we determine whether the circumstances, if conceptually proper, actually exist in the particular case. That assessment involves factfinding and the trier's determinations may be set aside only for clear error. See 18 U.S.C. § 3742(d).
>
> Third, once we have assured ourselves that the sentencing court considered circumstances appropriate to the departure equation and that those factors enjoyed adequate record support, the direction and degree of departure must, on appeal,

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[5]This court has jurisdiction over the appeal pursuant to 18 U.S.C. §3742(b), despite the government's belated submission of certification of written approval of the Solicitor General. *United States v. Smith*, 910 F.2d 326, 328 (6th Cir. 1990).

> be measured by a standard of reasonableness. 18 U.S.C. § 3742(e)(2); et al.

Id. at 506 (quoting *United States v. Diaz-Villafane*, 874 F.2d 43, 49 (1st Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 177 (1989)).

In sentencing Rutana, the district judge gave the following explanation for his downward departure from the guidelines:

> The presentence report has a guideline range of 18, Category One, which is 27 to 30[6] months. This Court for the reasons stated now, and because this defendant has a business employing some people and may put them out of work, and I'm going to depart downward to an Offense Level of 6, Category One.

Thus, the district judge clearly relied upon Rutana's ownership of another business which, he concluded, might fail if Rutana were to be incarcerated.

Our *de novo* review leads us to a conclude that the circumstance expressly relied upon by the district court does not make this case sufficiently unusual to warrant a downward departure from the guidelines. The guidelines specifically state that a defendant's socioeconomic status is not relevant in the determination of a sentence. U.S.S.G. §5H1.10; *Brewer*, 899 F.2d at 508. Furthermore, even assuming that Rutana's imprisonment would lead to the failure of his business and the loss of his employees' jobs, this fact does not distinguish Rutana from other similar offenders. "'[T]here must be something 'special' about a given offender, or the accouterments of the crime committed, which distinguishes the case from the mine-run for that offense.'" *United States v. McDowell*, 902 F.2d 451, 455

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[6]This reference to 27 to 30 months appears to be a misstatement by the district judge; the guidelines range was in fact 27 to 33 months.

(6th Cir. 1990)(quoting *United States v. Aguilar-Pena*, 887 F.2d 347, 350 (1st Cir. 1989)). We find nothing special about an industrial polluter who also happens to be an employer. The very nature of the crime dictates that many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families. In sum, Rutana's status as a business owner simply does not distinguish his case from the "mine-run" of cases involving the discharge of prohibited effluents into the environment, and is not a legally sufficient basis for downward departure.

The district court appears to have relied upon other factors in its downward departure, factors which it did not articulate during its sentencing of Rutana. Fiorini and Barnes, who were sentenced immediately preceding Rutana at the same hearing, also received downward departures to probation, although the district court gave different reasons for these departures. In sentencing each of these co-defendants, the district judge expressed the opinion that the minimum fine, which he believed to be mandatory for each count, was "harsh" in combination with the term of imprisonment called for by the guidelines. In sentencing Barnes, the district court also expressed some concern that FCA did not have the economic "wherewithal" to comply with changing federal effluent standards.

The imposition of a "harsh" fine is not a proper basis for departure from the guidelines. The guidelines have already taken fines, even large ones, into consideration. *See* U.S.S.G. §5E1.2(c)(3) (specifying minimum fine of $6,000 and a maximum fine of $60,000 for offense levels 18 and 19).[7] Economic considerations likewise do not provide a basis for downward departure. U.S.S.G. Ch.1, Pt.A.4(b) (economic hardship may not be considered as grounds for departure); U.S.S.G. §5K2.12, p.s.

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[7]Furthermore, as we note *infra* in Part III, the district court's imposition of Rutana's fine was based on an erroneous assumption that the relevant statute mandated a fine for each count.

(economic pressures upon a business do not warrant a decrease in sentence).[8]

Rutana argues that because his sentence is now "uniform" with those of Barnes and Fiorini, resentencing him could result in the type of disparity which the guidelines were intended to prevent. *See* 18 U.S.C. §3553(a)(6) (sentencing court must consider, among other factors, the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct). However, departure in order to achieve conformity among co-defendants is not appropriate where there is a basis for disparity. *United States v. Nelson*, 918 F.2d 1268, 1273 (6th Cir. 1990). The record indicates that there is indeed some basis for disparity. Both Fiorini and Barnes pled guilty to negligent, rather than knowing, violations of the Clean Water Act. U.S.S.G. §2Q1.2 assumes knowing conduct, and downward departure may be warranted in cases involving negligent violations. U.S.S.G. §2Q1.2, comment. (n.4). In addition, both Fiorini and Barnes received decreases of four levels for their "minimal participant" roles in the offenses, while Rutana received an increase of two levels for his leadership role. Rutana's situation was not the same as that of his co-defendants, and we decline to hold as a matter of law that his sentence should be the same.

III

We appreciate the difficult task of the sentencing judge, and do not wish to displace his discretion in resentencing Mr. Rutana. In our decision, we have simply indicated those factors which are improper bases for departure. However, we stress that in imposing sentence, the district

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[8]Federal effluent limitations are established with economic considerations in mind. *See* 33 U.S.C. §1317(a)(2)("Each toxic pollutant . . . shall be subject to effluent limitations resulting from the application of the best available technology economically achievable[.]"). Effluent standards are reviewed and, if appropriate, are revised at least every three years. 33 U.S.C. §1317(a)(3).

court should not only eliminate consideration of those factors which the guidelines have already taken into account or expressly deemed irrelevant; he should also consider "the full panoply" of relevant sentencing factors, aggravating as well as mitigating. *Brewer*, 899 F.2d at 511. We remind the district court that the burden of persuading the sentencing court that a downward departure is warranted rests with the defendant. *United States v. Bogas*, 920 F.2d 363, 369 (6th Cir. 1990). Furthermore, the court must state the specific reason(s) for any departure. *Id*; *United States v. Fitzwater*, 896 F.2d 1009, 1011 (6th Cir. 1990).

Finally, in resentencing, the district court should also reconsider whether to fine Rutana on all 18 counts of his conviction. In setting the fine, the district court was acting under the erroneous impression that the $5,000 per count fine was a mandatory minimum. While the total amount of Rutana's fine was technically proper, and while the guidelines state that some fine shall be imposed in all cases, *see* U.S.S.G. §5E1.2(a), the statute under which Rutana was sentenced does not require a fine for *each* violation. Rather, 33 U.S.C. §1319(c)(2) gives the sentencing court the option of imposing a fine or imprisonment, or both.[9] Although the government did not object below to the district court's erroneous approach in imposing Rutana's fine, we nonetheless deem reconsideration of the fine to be necessary, particularly in light of the need for the *combined* sentence to serve the purposes stated in the guidelines. **REMAND** this case to the district court for resentencing.

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[9]33 U.S.C. §1319(c)(2) provides that violations such as Rutana's "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both."

APPENDIX B

United States District Court's Judgment of Conviction and Sentencing Order of John W. Rutana

(Filed March 14, 1990)

Case No. 4:89CR0158

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FINISHING CORPORATION OF AMERICA, INC., JOHN W. RUTANA, RICHARD J. FIORINI, JOHN C. BARNES,
Defendants.

JUDGMENT OF CONVICTION AND SENTENCING ORDER OF DEFENDANT, JOHN W. RUTANA

JUDGE ALVIN I. KRENZLER

This matter came on for sentencing on March 2, 1990. The defendant, John W. Rutana, was charged in twenty-two counts of a forty-count indictment, filed on May 31, 1989. He was charged in Counts 1 through 18 with violations of 33 U.S.C. §§1317(d) and 1319(c)(2)(A) (knowingly discharging pollutants), and in Counts 19 and 20 with violations of 33 U.S.C §§1317(d) and 1319(c)(3)

(knowingly discharging pollutants with knowledge that said discharge would place persons in imminent danger of injury or death).

At the arraignment the Court accepted a plea of not guilty to the charges against the defendant and set the matter for trial.

Prior to trial, the defendant informed the Court that he wished to change his plea from not guilty to guilty to Counts 1 through 18 in the indictment. The matter was set for a change-of-plea hearing on October 2, 1989. At this hearing, the defendant was present with his retained counsel, Charles Dunlap, Esq. Representing the government was Gregory Sasse, Assistant United States Attorney. The defendant was given his constitutional rights and informed of those rights which he would waive if the Court accepted his guilty plea. The Court advised the defendant that, pursuant to the Sentencing Reform Act of 1984, the United States Sentencing Commission issued Sentencing Guidelines for judges to follow in determining the sentence in a criminal case. The defendant acknowledged that he had reviewed the Sentencing Guidelines with his counsel. The defendant acknowledged that he understood the effect of the Sentencing Guidelines. The Court then informed the defendant of the maximum sentence he could receive if the Court accepted his guilty plea. The defendant stated that no threats or promises had been made to him, and that he voluntarily desired to enter a plea of guilty to Counts 1 through 18 of the indictment.

The Court was notified that an oral Fed. R. Crim. P. 11 plea agreement had been entered into between the defendant and the government. Pursuant to this agreement, the defendant agreed to plead guilty to Counts 1 through 18 of the indictment. In exchange for

his plea of guilty to Counts 1 through 18 of the indictment, the government agreed to move to dismiss Counts 19, 20, 39 and 40 of the indictment at the time of sentencing. In addition, the government agreed to recommend that any terms of incarceration imposed upon the defendant run concurrently with each other. Finally, the government and the defendant entered into a non-binding joint resolution to the effect that §§2Q1.2(b)(1)(A) and (b)(3) of the Sentencing Guidelines would apply to the calculation of the defendant's sentence and that §2Q1.2(b)(2) would not apply.

The government presented a factual basis for the guilty plea. The defendant stated that the facts as presented were true, that no contrary evidence would be presented at trial, and that he was in fact guilty of the charges in Counts 1 through 18 of the indictment. After determining that the factual basis was sufficient to support a conviction and that the plea was knowingly and voluntarily made, the Court accepted the plea agreement and the defendant's plea of guilty to Count 1 through 18 of the indictment (violations of 33 U.S.C. §§1317 (d) and 1319 (c)(2)(A)).

The Court then continued the matter for sentencing pending the preparation and receipt of a presentence report from the Federal Probation Department.

At the sentencing, defendant was present and was represented by his retained counsel, Charles Dunlap, Esq. Representing the government was Gregory Sasse, Assistant United States Attorney. Defendant, through his counsel renewed his Motion for a Continuance of the Sentencing. The Court overruled the defendant's motion for a continuance.

The Court, addressing both the defendant and counsel for the defendant, asked whether they had had an opportunity to review the presentence report and whether there were any inaccuracies, corrections, additions or deletions to be made to the presentence report. The defendant and counsel for the defendant stated that the presentence report was accurate with the exception of a fact relating to the value of stock owned by the defendant. Specifically, the presentence report at page 19, paragraph 61, states that defendant owns $30,000.00 worth of stock. Defendant stated that the amount should be $3,000.00 worth of stock. The Court stated that if the presentence report was inaccurate in this regard, it would amend the presentence report. The Court then accepted the presentence report. The Court then provided counsel for the defendant and the defendant himself with an opportunity to make a statement in the defendant's behalf and to present any information in mitigation of punishment. Counsel for the government was given an equivalent opportunity to address the Court.

The Court then sentenced the defendant, John W. Rutana, to five years probation, with the special condition that defendant perform 1,000 hours of community service, preferably in the area of studying pollution problems and working out solutions to the same. In addition, the Court fined the defendant $90,000.00. In sentencing the defendant, the Court departed from the Sentencing Guidelines offense level of 18 to offense level 6, category 1. The defendant was also ordered to pay a special assessment of $50.00 per count for a total of $900.00 into the Crime Victim's Fund, as required by 18 U.S.C. §3013.

Counsel for the government, pursuant to the Fed. R. Crim. P. 11 plea agreement, then moved to dismiss Counts 19, 20, 39, and 40 of the indictment. The Court granted the government's motion and dismissed Counts 19, 20, 39 and 40 of the indictment.

The Court informs the defendant of his right to appeal his sentence pursuant to Fed. R. Crim. P. 32. The Court also informs the defendant that if he is financially unable to obtain counsel for the purpose of appeal, the Court will appoint counsel to represent him.

Accordingly, the Court enters a judgment of conviction against the defendant, John W. Rutana, for violation of 33 U.S.C. §§1317(d) and 1319 (c)(2)(A) (knowingly discharging pollutants).

IT IS SO ORDERED.

/s/ ALVIN I. KRENZLER
United States District Judge

Charles Dunlap
U.S. Marshall
Probation
U.S. Attorney

Judgment Including Sentencing of the United States District Court

(Filed March 14, 1990)

Case Number 4:89CR0158

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

v.

JOHN W. RUTANA,
(Name of Defendant)

Charles Dunlap
Defendant's Attorney

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

THE DEFENDANT:

[x] pleaded guilty to count(s) one through eighteen (1-18).

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involved the following offenses:

Title & Section	*Nature of Offense*	*Count Number(s)*
33:1317(d) 33:1319(c)(2)(A)	knowingly discharging pollutants	(1-18)

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[x] Count(s) 19, 20, 39 and 40 (is) (are) dismissed on the motion of the United States.

[x] The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

[ ] It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

270-32-5354

March 2, 1990
Date of Imposition of Sentence

Defendant's mailing address:

8531 Van Drive
Poland, OH 44514

/s/ ALVIN I. KRENZLER
Signature of Judicial Officer

Alvin I. Krenzler,
U.S. District Judge
Name & Title of Judicial Officer

Defendant's residence address:

same as above

3-14-90
Date

PROBATION

The defendant is hereby placed on probation for a term of five (5) years.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this Judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions:

The defendant shall perform 1,000 hours of community service, preferably in the area of studying pollution problems and working out solutions to the same., as directed by the Federal Probation Department.

* * * * *

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $90,900.00, consisting of a fine of $90,000.00 and a special assessment of $900.00.

[ ] These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

special assessment of $50.00 per count for a total of $900.00 (1-18)

This sum shall be paid [[immediately.
[x] as follows:

As directed by the Federal Probation Department.

[ ] The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

APPENDIX C

Order of the United States Court of Appeals For the Sixth Circuit

(Filed August 23, 1990)

No. 90-3343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN W. RUTANA,
Defendant-Appellee.

ORDER

BEFORE: JONES and NELSON, *Circuit Judges*; and SILER, *Chief District Judge**

The United States appeals, pursuant to 18 U.S.C. §3742, the sentence imposed upon the defendant for violations of the federal Clean Water Act. The defendant now moves for dismissal of the appeal on grounds that the government failed to timely certify that the Attorney General or Solicitor General had personally approved the notice of appeal. The government has responded in opposition.

---

* The Honorable Eugene E. Siler, Jr., Chief District Judge for the Eastern District of Kentucky, sitting by designation.

The judgment of sentence was entered on March 16, 1990. On April 13, 1990, the government filed a timely notice of appeal from the sentence. On April 19, 1990, the government served upon the defendant an authorization to file the notice of appeal. That authorization, signed by the Solicitor General on April 17, indicates that on April 12, 1990, he authorized the filing of the notice of appeal.

The government, "with the personal approval of the Attorney General or Solicitor General" may appeal a sentence pursuant to 18 U.S.C. §3742(b). We conclude that the certification of written approval is sufficient in this case. The government is, however, referred to this court's opinion in *United States v. Smith*, _____ F.2d _____, No. 89-2346, slip op. at 4 (6th Cir. August 6, 1990), which imposes, prospectively, a rule to be followed in these appeals. We also note that the government has not yet filed the certification with this Court, although it has filed its brief. The government is directed to file a copy of the certification with the clerk of the court within 14 days of the entry of this order.

It is therefore ORDERED that the motion to dismiss is denied. The government shall file a copy of its certification of the Solicitor General's approval of the appeal within 14 days of the entry of this order.

ENTRY OF ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

Supreme Court, U.S.
FILED
SEP 26 1991
OFFICE OF THE CLERK

(2)

No. 91-168

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN W. RUTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWARD J. SHAWAKER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

1. Whether 18 U.S.C. 3742(b) requires the government to furnish written certification—no later than the filing of a notice of appeal—that the Solicitor General has authorized an appeal of an otherwise final sentence.

2. Whether the possible impact of the defendant's imprisonment on his employees warranted a downward departure from the range of imprisonment indicated by the Sentencing Guidelines to a term of probation.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-168

JOHN W. RUTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A3-A11, is reported at 932 F.2d 1155. The district court's sentencing order, Pet. App. A12-A16, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1991. The petition for a writ of certiorari was filed on July 24, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a plea of guilty, in the United States District Court for the Northern District of

Ohio, to 18 counts of intentionally violating the national pretreatment standards of the Clean Water Act, in violation of 33 U.S.C. 1319(c)(2)(A). The district court sentenced petitioner to five years' probation, including the condition that he perform 1,000 hours of community service, and ordered him to pay a fine of $90,900. On the government's appeal, the court of appeals reversed the district court's sentencing order and remanded for resentencing. Pet. App. A3-A11.

1. Petitioner was a part owner and chief executive officer of the Finishing Corporation of America (FCA), a metal finishing plant in Campbell, Ohio. FCA discharged chemical waste into a sewer line connected to the Campbell Waste Water Treatment Plant (CWWTP). The CWWTP, in turn, discharges into the Mahoning River, which provides drinking water for several communities downstream of the treatment plant. Pet. App. A4 & n.1.

In 1986 and 1987, chemical waste water from FCA killed bacteria in the treatment plant. CWWTP notified petitioner of the effects of its discharges, but an attempt by petitioner and FCA's plant manager to solve the problem failed. In 1988, CWWTP documented 18 additional illegal discharges of chemical waste by FCA into the treatment plant. Two of those discharges caused chemical burns to a CWWTP employee who attempted to take samples of the water entering the treatment plant. Even though petitioner was aware of the discharges, he made no effort to prevent further releases. Petitioner ultimately agreed to close FCA, but at least one more discharge occurred after petitioner closed the plant. Pet. App. A4-A5.

2. After accepting petitioner's plea of guilty, the district court ordered the probation officer to prepare

a presentence report. The probation officer assigned petitioner an offense level of 18 and a criminal history category of I.[1] The district court accepted the probation officer's factual premises and calculations, but it departed downward to the sentencing range for offense level 6 and criminal history category I. Pet. App. A15. The court explained: "this defendant has a business employing some people and [imprisonment] may put them out of work." *Id.* at A8. The business to which the court referred is Viking Manufacturing Company, a separate entity from FCA. *Id.* at A6. The district court entered its judgment of sentence on March 16, 1990. *Id.* at A21.

3. On April 12, 1990, the Solicitor General authorized an appeal of that judgment. On April 13, the United States Attorney filed a notice of appeal. On April 17, the Solicitor General signed a written authorization indicating that he had previously authorized an appeal on April 12. On April 19, the government furnished petitioner a copy of the written authorization. Pet. App. A21.

Petitioner moved to dismiss the government's appeal, arguing that 18 U.S.C. 3742(b) required the Solic-

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[1] The probation officer calculated the offense level as follows:

> (1) Base offense level of eight (8) for mishandling of hazardous or toxic substances, under U.S.S.G. § 2Q1.2(a).
>
> (2) Increase by six (6) levels, for repetitive discharge, under U.S.S.G. § 2Q1.2(b)(1)(A).
>
> (3) Increase by four (4) levels, for disruption of a public utility, under U.S.S.G. § 2Q1.2(b)(3).
>
> (4) Increase by two (2) levels, for playing a leadership role in the activity, under U.S.S.G. § 3B1.1(c).
>
> (5) Decrease by two (2) levels, for acceptance of responsibility, under U.S.S.G. § 3E1.1(a).

Pet. App. A6.

itor General's written authorization to accompany the notice of appeal. The court of appeals denied petitioner's motion. Although that court had exercised its supervisory power to require the government to provide written proof that appeal had been authorized no later than the filing of its opening brief, see *United States* v. *Smith*, 910 F.2d 326 (6th Cir. 1990), it noted that its rule, which was prospective, Pet. App. A21, did not apply to this case. The court then concluded that it had "jurisdiction over the appeal * * * despite the government's belated submission of certification of written approval of the Solicitor General." *Id.* at A7 n.5.

On the merits, the court of appeals reversed the district court's sentencing determination and remanded for resentencing. Pet. App. A11. It reasoned that petitioner's status as a business owner was not a permissible basis for a downward departure. "The guidelines specifically state that a defendant's socio-economic status is not relevant in the determination of a sentence." *Id.* at A8 (citing Sentencing Guidelines § 5H1.10). The court further concluded that the impact of petitioner's incarceration on his employees did not distinguish petitioner from other polluters since "[t]he very nature of the crime dictates that many defendants will likely be employers, whose imprisonment may potentially impose hardship upon their employees and families." Pet. App. A9. "In sum, [petitioner's] status as a business owner simply does not distinguish his case from the 'mine-run' of cases involving the discharge of prohibited effluents into the environment, and is not a legally sufficient basis for downward departure." *Ibid.*

ARGUMENT

1. Petitioner's first specification of error—that the Solicitor General did not authorize an appeal before the U.S. Attorney filed a notice of appeal—rests on an erroneous factual premise. The court of appeals found, Pet. App. A21, and petitioner does not dispute, that the Solicitor General authorized an appeal of his sentence on April 12, 1990, the day before the U.S. Attorney filed the notice of appeal in his case. Although it is true that the Solicitor General did not sign the document confirming his authorization until April 17, the statute that was then applicable to government appeals of sentences required only "the personal approval of the Attorney General or the Solicitor General," 18 U.S.C. 3742(b) (1988); it did not require that such approval be in writing. Thus, petitioner is simply wrong when he asserts that the government "missed a deadline" and effected a "retroactive appeal," Pet. 11, 12, because nothing in the then-applicable version of the statute, or in its legislative history, supports petitioner's suggestion (Pet. 12) that written approval had to precede the filing of the notice of appeal.

In *United States* v. *Smith*, 910 F.2d at 328, the Sixth Circuit required that the government furnish evidence of the Solicitor General's written authorization to appeal no later than the filing of the government's brief, and that the Solicitor General's authorization be dated no later than the day on which the notice of appeal was filed. But that decision confirmed that "proof of the personal approval [of the Solicitor General] is not of jurisdictional dimensions in the sense that a timely notice of appeal in a criminal case is jurisdictional." *Ibid.* The filing requirement came not from 18 U.S.C. 3742(b), but from the court of appeals' "exercise of its supervisory authority," prospectively.

910 F.2d at 328. Because *Smith* was issued after the government filed its notice of appeal in this case, the supervisory rule in *Smith* was not applicable to this case. Moreover, in light of the fact that the rule was not jurisdictional or otherwise dictated by the statute, it was entirely appropriate for the court to enforce its rule prospectively and to conclude that the certification of written approval was sufficient in this case. Pet. App. A21.

In any event, Congress amended 18 U.S.C. 3742 as part of the Crime Control Act of 1990, Pub. L. No. 101-647, § 3501, 104 Stat. 4921, to eliminate any requirement that the Solicitor General authorize an appeal prior to the filing of a notice of appeal. As amended, 18 U.S.C. 3742(b) provides that the government may file a notice of appeal in the district court for review of a sentence without the Solicitor General's approval, but that the government "may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." That statute solves the timing problem that had resulted in the need for oral authorizations to appeal. The first question presented by the petition is therefore of no continuing importance.

2. The difficulty petitioner may face running his business from prison (and the consequent effect on his employees) is not a permissible basis for the district court to depart downward from the range of sentences prescribed by the Sentencing Guidelines. The court of appeals held, Pet. App. A8-A9, and petitioner apparently concedes, Pet. 13, that his status as a businessman does not warrant a downward departure. That concession accords with the statute authorizing promulgation of the Guidelines, 28 U.S.C. 994(d) (Guidelines and policy statements must be "entirely

neutral as to the * * * socioeconomic status of offenders"), and the uniform view of the courts of appeals, see, *e.g.*, *United States* v. *Prestemon*, 929 F.2d 1275 (8th Cir. 1991); *United States* v. *Hatchett*, 923 F.2d 369 (5th Cir. 1991); *United States* v. *McHan*, 920 F.2d 244 (4th Cir. 1990).

The petition (Pet. 13) attempts to recast the district court's special treatment as a favor to petitioner's employees rather than to himself. But no court of appeals has upheld a downward departure because of a defendant's responsibilities as an employer, and there is no authority to do so.[2] As the Fourth Circuit explained in *McHan*, 920 F.2d at 247, the Guidelines "rest sentences upon the offense committed, not upon the offender":

> [O]f the fifteen grounds for departure listed in § 5K2.0, p.s., et seq., not a single one looks to characteristics of the defendant: ten factors examine the specific criminal conduct and the resulting harm, and five relate to the defendant's mental capacity or motive at the time of the conduct. * * * The Guidelines clearly eschew consideration of personal characteristics in their attempt to relate sentences to a defendant's actual criminal conduct.

Accordingly, a district court may not ordinarily depart downward to mitigate the impact of imprisonment on a defendant's family. See 28 U.S.C. 994(e) (Guidelines should "reflect the general inappropri-

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[2] The two cases on which petitioner relies (Pet. 14), *United States* v. *Rodriguez*, 882 F.2d 1059 (6th Cir. 1989), cert. denied, 493 U.S. 1084 (1990), and *United States* v. *Ryan*, 866 F.2d 604 (3d Cir. 1989), involved upward departures from the Guidelines range for persons convicted of drug offenses. They shed no light on the propriety of downward departures based on the defendant's management of a business.

ateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."); Sentencing Guidelines § 5H1.6.[3] By the same token, a court may not justify a downward departure simply because a term of imprisonment may have an adverse impact on the defendant's ability to fulfill even less immediate responsibilities, such as his obligations to his employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

EDWARD J. SHAWAKER
Attorney

SEPTEMBER 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991—262 061/45034

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[3] Guidelines § 5H1.6 states:

Family Ties and Responsibilities, and Community Ties (Policy Statement)

Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines. Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in determination of the length and conditions of supervision.